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ADMITTED IN D.C. ONLY

MAY 13 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

May 13, 1993

OUR FILE NO.
0250-120-63

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Beverly Hills, Florida
MM Docket No. 92-195

Dear Ms. Searcy:

Sarasota-FM, Inc., Gator Broadcasting Corporation, and Heart of Citrus, Inc. hereby transmit an original and four copies of their "Opposition to Petition for Reconsideration" in the above-captioned proceeding.

Please contact the undersigned directly if there are any questions concerning this matter.

Sincerely yours,



David G. O'Neil

DGO:do
Enclosures (5)

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MAY 13 1993

Before The

Federal Communications CommissionFEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Washington, D.C. 20554

In The Matter Of

Amendment of Section 73.202(b)
 FM Table of Allotments
 FM Broadcast Stations
 (Beverly Hills, Chiefland,
 Holiday, Micanopy, and
 Sarasota, Florida

MM Docket No. 92-195
 RM-7091
 RM-7146
 RM-8123
 RM-8124

TO: Chief, Allocations Branch
 Policy and Rules Division

Opposition to Petition for Reconsideration

Sarasota-FM, Inc. ("SFI"), licensee of FM Radio Broadcast Station WSRZ, Sarasota, Florida, Gator Broadcasting Corporation ("Gator"), licensee of FM Radio Broadcast Station WRRX, Micanopy, Florida, and Heart of Citrus, Inc. ("Heart"), licensee of FM Radio Broadcast Station WXOF, Beverly Hills, Florida, pursuant to Section 1.429 of the Commission's Rules and by their attorneys, hereby file their Opposition to Dickerson Broadcasting, Inc.'s ("Dickerson") Petition for Reconsideration.¹ The Commission must dismiss Dickerson's petition for relying upon facts which Dickerson could have raised in the reply comments phase of the above-captioned proceeding. In addition, the Commission correctly concluded that the allotment of Channel 292C3 to Beverly Hills, Florida and modification of license of WXOF accordingly complied with the mileage separation rules contained in Section 73.213(c)(1). In support thereof, the following is hereby shown:

¹ Dickerson filed its petition for reconsideration on April 28, 1993. Section 1.429(f) permits the filing of an opposition pleading 15 days after the date the petition appears on public notice. Thus this pleading is timely filed.

I. INTRODUCTION

1. In September, 1992 the Commission released a *Notice of Proposed Rule Making*, 7 FCC Rcd 5910 (1992) (Chief, Allocations Branch), proposing the substitution of Channel 246C3 for Channel 246A at Beverly Hills, Florida and the modification of license of WXOF accordingly. The *NPRM* established October 30, 1992 and November 16, 1992 as the dates for filing comments and reply comments, respectively.

2. On October 30, 1992, SFI and Gator jointly filed comments in this proceeding. Instead of proposing an upgrade in facilities for WXOF alone as the *NPRM* suggested, SFI and Gator proposed upgrades for WXOF, WSRZ, WRRX, and FM Radio Broadcast Station WLVU, Holiday, Florida. SFI and Gator proposed the following channel substitutions:

<u>Community</u>	<u>Present Channel</u>	<u>Proposed Channel</u>	<u>Station</u>
Sarasota, FL	292A	293C2	WSRZ
Holiday, FL	292A	246C2	WLVU
Beverly Hills, FL	246A	292C3	WXOF
Micanopy, FL	249A	247C2	WRRX
Chiefland, FL	247A	300A	WLQH

3. On November 20, 1992, the Commission released a Public Notice listing the SFI/Gator proposal. *Report No.1918* (Exhibit 1). The Public Notice permitted the public to file comments on or before December 5, 1992. Dickerson failed to avail itself of the opportunity to file reply comments to the SFI/Gator proposal.

4. The SFI/Gator proposal best serves the public interest. First, the SFI/Gator proposal would provide wide area service for each party seeking such service in the Beverly Hills proceeding. Second, the SFI/Gator

proposal would resolve favorably for all affected parties the pending proposals for service improvements in MM Docket No. 87-455, a proceeding which has been pending before the Commission since December, 1987, or approximately five and one-half years. Third, under the SFI/Gator proposal, everyone **wins**.

5. The Commission agreed and granted the SFI/Gator proposal. *Report and Order*, DA 93-282 (released March 29, 1993) (Chief, Allocations Branch). The Commission ruled that reliance upon Section 73.213(c) of the Commission's rules to determine the appropriate mileage separation between Channel 292C3 at Beverly Hills and Channel 292A, Starke, Florida was proper. The Commission held that because Heart filed its petition for rule making to change the allotment for Beverly Hills prior to October 2, 1989, the allotment ultimately chosen for Beverly Hills is entitled to processing under Section 73.213(c)(1) of the Commission's Rules with respect to FM Radio Broadcast Station WEAG, Starke, Florida. *Id.* at 2 n.6.²

6. On April 28, 1993, Dickerson filed its petition for reconsideration with the Commission. The majority of Dickerson's petition has nothing to do with the instant proceeding, instead berating the Commission for refusing to grant Dickerson an increase in power in another proceeding and allegedly permitting increased interference to WEAG from other broadcasters, although Dickerson concedes the alleged interference complies with the Commission's mileage separation rules. Dickerson challenges the *Report and Order* in the Beverly Hills proceeding only to the

² On August 30, 1989, SFI and Gator filed a petition for rule making proposing the allotment of Channel 292 to Beverly Hills, Florida. The similarity in the SFI/Gator rule making petition (filed prior to October 2, 1989) and the SFI/Gator proposal in the Beverly Hills proceeding further supports the Commission's rationale that the allotment of Channel 292C3 is entitled to processing under Section 73.213(c)(1).

extent that the Commission used the mileage separation rules of Section 73.213(c) to allot Channel 292C3 to Beverly Hills.

II. DICKERSON'S PETITION RELIES UPON FACTS WHICH IT FAILED TO RAISE IN A TIMELY MANNER

7. The Commission should dismiss Dickerson's petition because it failed to raise its objections to the substitution of Channel 292C3 at Beverly Hills during the time for filing reply comments in the Beverly Hills proceeding. Section 1.429(b) forbids the Commission from considering a petition for reconsideration which relies on facts which have not previously been presented to the Commission unless the facts relate to changed circumstances since the last opportunity to present them to the Commission, the facts were unknown to the petitioner or undiscoverable through the exercise of ordinary diligence, or the public interest so demands.

8. None of these exceptions are present here. As a threshold matter, Dickerson presents no new facts for consideration by the Commission in this proceeding. Dickerson's argument against invoking Section 73.213(c) of the Commission's Rules to allot Channel 292C3 to the Commission was considered and rejected by the Commission in the *Report and Order*. Dickerson's failure to timely object to the allotment of Channel 292C3 after the Commission released a public notice specifying the SFI/Gator proposal demonstrates a lack of ordinary diligence on the part of Dickerson.³ Because the allotment of Channel 292C3 complies with Section

³ Dickerson's claim that it should have been served in the Beverly Hills proceeding is devoid of merit. None of the parties proposed any change in the FM Table of Allotments, Section 73.202(b), for WEAG. Consequently, there was no reason for the parties in the Beverly Hills proceeding or the Commission to serve Dickerson. In any event, ordinary diligence on the part of Dickerson would have led to discovery of the public notice specifying the SFI/Gator proposal.

73.213(c) and provides wide area service for four broadcast stations, the public interest demands denial of Dickerson's petition.⁴

III. RELIANCE UPON SECTION 73.213(C) FOR ALLOTING CHANNEL 292C3 IS PROPER

9. It is axiomatic that a petition for rule making filed prior to October 2, 1989, may rely upon the mileage separation rules of Section 73.213(c) and not the revised mileage separation rules of Section 73.207. *Amendment of Part 73 of the Rules to Provide for an Additional FM Station Class (Class C3) and to Increase the Maximum Transmitting Power for Class A FM Stations*, 4 FCC Rcd 6375, 6382 (1989). Prior to October 2, 1989, both Heart and SFI/Gator filed separation petitions for rule making, proposing different channel substitutions for Beverly Hills. Because both petitions specified a new allotment for Beverly Hills, each petition may rely upon the mileage separation requirements contained in Section 73.213(c).

10. At a minimum, Heart, SFI and Gator are entitled to rely upon Section 73.213(c) for the community and channel contained in their rule making petitions. Because Heart proposes a change in the FM Table of Allotments for Channel 246C3 for Beverly Hills, Florida, the mileage separation rules of Section 73.213(c) applies not only to a proposal to allot Channel 246C3 to Beverly Hills, but any counterproposal allotting a channel to Beverly Hills. Similarly, because the SFI/Gator rule making petition proposed the allotment of Channel 292 to Beverly Hills, the SFI/Gator

⁴ Dickerson also failed to comply with the Commission's Rules by failing to serve counsel for Gator. David G. O'Neil, Esq. is counsel for SFI, not Gator. To the extent that Dickerson intended to serve Gator and mistakenly identified Mr. O'Neil as its counsel, Dickerson then failed to serve SFI.

petition, and any counterproposal, may invoke the mileage separation provisions of Section 73.213(c).

11. Dickerson itself concedes that this application of Section 73.213(c) is proper. Dickerson claims that Heart may avail itself of the provisions of Section 73.213(c)(1) with respect to WEAG not only for Channel 246C3, filed prior to October 2, 1989, but also for Channel 246C2, filed after October 2, 1989, as a counterproposal to the underlying petition for rule making. If Heart may invoke Section 73.213(c) for its counterproposal, then SFI/Gator may rely upon the same provisions for a counterproposal to the same community. This is particularly correct when one takes into consideration the fact that SFI/Gator filed a petition for rule making to allot Channel 292 to Beverly Hills prior to October 2, 1989. Under the Dickerson approach, SFI/Gator is permitted to rely upon Section 73.213(c) for any allotment of Channel 292 to Beverly Hills, regardless of the class of station.

12. That Dickerson should misinterpret application of the mileage separation provisions of Section 73.213 is not surprising given Dickerson's history of complaining to the Commission that the Commission enforces its mileage separation rules to Dickerson's detriment. In the past, Dickerson has claimed objectionable interference to WEAG from WDFL-FM on Channel 292 and opposed proposed allocations for Cross City,⁵ Five Points, and Ponte Vedra Beach, Florida and Kingsland, Georgia. But at the same time Dickerson acknowledged that the proposed allocations complied with the Commission's mileage separation rules.

⁵ Ironically, Dickerson's petition for reconsideration will delay changing channels for WDFL-FM from Channel 292A to Channel 295C1. This is because Dickerson's petition for reconsideration automatically stays the *Report and Order* in this proceeding. This in turn delays the Commission from dismissing as moot SFI's pleadings, including a motion to stay, in MM Docket No. 87-455. As a result, WDFL-FM is unlikely to change channels until this cloud is removed. Where Dickerson to withdraw its petition, the *Report and Order* would become final, the Commission could dismiss SFI's pleadings in MM Docket No. 87-455, and WDFL-FM could change channels, thereby satisfying one of Dickerson's concerns.

**IV. ALLOTING CHANNEL 292C3 BETTER SERVES THE
PUBLIC INTEREST THAN INCREASING POWER FOR WEAG**

13. Upgrading the facilities of WXOF better serves the public interest than increasing power for WEAG. Dickerson's claim that it can increase power for WEAG is deficient as a procedural matter because Dickerson has not entered into written agreements with the necessary parties in order for WEAG to increase power. Moreover, neither WEAG nor any of the parties have filed applications with the Commission to increase power. And two of the parties are still in a comparative proceeding! Accordingly, WEAG's claim that it could increase power but for allotment of Channel 292C3 to Beverly Hills is speculative. The Commission should affirm the *Report and Order* rather than defer to a speculative increase in power for WEAG.

14. Dickerson's claim that its proposed increase in power for WEAG is superior to upgrading the facilities of WXOF is unsupported and cannot be considered in this proceeding in any event. Dickerson fails to provide any evidence in its petition for reconsideration to support its claim. Even if it did, the evidence is irrelevant. Amending the FM Table of Allotments to upgrade WEAG is different than increasing power for WEAG. Dickerson may not invoke the Commission's priorities for allotting FM Channels in its effort to increase power for WEAG.

15. Assuming, *arguendo*, that Dickerson is correct and the Commission should consider the proposed improvement in service resulting from increasing power for four Class A Stations, Dickerson's proposal is still inferior to the upgrades ordered in the *Report and Order*. The *Report and Order* upgraded the facilities for four stations, with a resultant increase in service to approximately 2,229,430 listeners. See *Engineering Statement of*

*Bromo Communications, Inc.*⁶ Dickerson provides no evidence supporting its claim at page 9 of its petition that increasing power for WEAG and three other stations will provide wide area service to at least 200,000 new listeners. Even if correct, the *Report and Order* provides wide area service for 11 times that number of listeners! Consequently, the Commission should upgrade WXOF to Channel 292C3.

V. CONCLUSION

16. Dickerson fails to provide any basis for overturning the Commission's decision in this proceeding. Dickerson's petition for reconsideration is procedurally deficient because Dickerson failed to raise its objections to the SFI/Gator proposal during the rule making proceeding. In addition, the Commission properly relied upon Section 73.213(c) of the Commission's Rules in allotting Channel 292C3 to Beverly Hills. Dickerson itself concedes that Section 73.213(c) is applicable not only to a petition for rule making filed prior to October 2, 1989, but also to any counterproposal to the specific proposals contained in the rule making petition. Because Heart (and SFI/Gator) filed petitions for rule making proposing a change in channels for Beverly Hills, any counterproposal filed in response may rely upon Section 73.213.

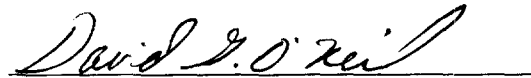
17. The Commission's decision in the *Report and Order* best serves the public by providing improved service to the public through an upgrade in facilities for four FM Radio Broadcast Stations. Dickerson, frustrated with the Commission's mileage separation rules, seeks to diminish service to the

public by prohibiting or restricting an upgrade for WXOF. For the reasons discussed above, the Commission should deny Dickerson's petition and affirm the *Report and Order*.

WHEREFORE, for the foregoing reasons, Sarasota-FM, Inc., Gator Broadcasting Corporation, and Heart of Citrus, Inc. respectfully request that the Commission dismiss Dickerson's petition for reconsideration.

Respectfully submitted,

Sarasota-FM, Inc.

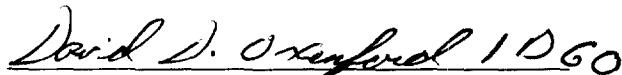


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ITS ATTORNEY

May 13, 1993

EXHIBIT 1



PUBLIC NOTICE

Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

30678

REPORT NO. 1918

November 20, 1992-G4

ASSOCIATE MANAGING DIRECTOR
PUBLIC INFORMATION AND REFERENCE SERVICES
PETITIONS FOR RULEMAKING FILED

RM No.	Rule Sec.	Petitioner	Date Rec'd.	Nature of Petition
8117	90	American Mobile Telecommunications Association, Inc. 1835 K Street, N.W. Suite 302 Washington, D.C. 20006 (Filed by Alan R. Shark, President)	10-26-92	Request Amendment of the Commission's Rules Governing 800 Mhz Specialized Mobile Radio Service Systems to Permit the Licensing of Wide-Area Block Authorizations.
8121*	73.202(b)	David A. Petrick (Filed by Eric J. Kravetz Brown, Nietert & Kaufman 1920 N Street, N.W. Suite 660 Washington, D.C. 20036)	10-30-92	Request Amendment FM Table of Allotments to add Ch. 280B to Needles, California at coordi- nates 34-58-54; 114-48-30; sub- stitute Ch. 242A for Ch. 280A at Bagdad, Arizona at coordinates 34-12-14; 113-12-14.

*THE ABOVE PETITION FOR RULEMAKING WILL BE TREATED AS A COUNTERPROPOSAL IN MM DOCKET NO. 92-194. REPLY COMMENTS TO THIS COUNTERPROPOSAL SHOULD BE SUBMITTED IN THIS DOCKET NO LATER THAN 15 DAYS (RATHER THAN WITHIN 30 DAYS) AFTER THE DATE OF THIS PUBLIC NOTICE.

11/20/92, 10:11 AM

11/20/92

RM No.	Rule Sec.	Petitioner	Date Rec'd.	Nature of Petition
8123*	73.202(b)	Heart of Citrus, Inc. (Filed by A. Wray Fitch III Gammon & Grange 8280 Greensboro Drive Seventh Floor McLean, VA 22102)	10-30-92	Request Amendment FM Table of Allotments to substitute Ch. 246C2 for Ch. 246A at Beverly Hills, Florida and modify the construction permit of Station WXOF to specify operation on Ch. 246C2 at coordinates 28-46-42; 82-28-31.
8124*	73.202(b)	Sarasota-FM, Inc. and (Filed by David G. O'Neil Michael H. Bader Haley, Bader & Potts 4350 North Fairfax Drive Suite 900 Arlington, VA 22203-1633) and Gator Broadcasting Corporation (Filed by David D. Oxenford, Jr. Fisher, Wayland, Cooper & Leader 1255 23rd Street, N.W. Suite 800 Washington, D.C. 20037)	10-30-92	Request Amendment FM Table of Allotments to substitute Ch. 247C2 for Ch. 249A at Micanopy, Florida and modify the license of Station WRRX-FM to specify operation on Ch. 247C2 at coordinates 29-38-55; 82-25-30; substitute Ch. 293C2 for Ch. 292A at Sarasota, Florida and modify the license of Station WSRZ-FM to specify operation on Ch. 293C2 at coordinates 27-27-49; 82-40-01; substitute Ch. 246C2 for Ch. 292A at Holiday Florida and modify the license of Station WLWU-FM to specify operation on Ch. 246C2 at coordinates 28-16-51; 82-42-52; substitute Ch. 292C3 for Ch. 246A at Beverly Hills, Florida and modify the construction permit of Station WXOF to specify operation on Ch. 292C3 at coordinates 28-44-09; 82-29-56; substitute Ch. 300A for Ch. 247A at Chiefland, Florida and modify the construction permit of Station WLQH to specify operation on Ch. 300A at coordinates 29-31-00; 82-53-11.

*THE ABOVE PETITIONS FOR RULEMAKING WILL BE TREATED AS COUNTERPROPOSALS IN MM DOCKET NO. 92-195. REPLY COMMENTS TO THESE COUNTERPROPOSALS SHOULD BE SUBMITTED IN THIS DOCKET NO LATER THAN 15 DAYS (RATHER THAN WITHIN 30 DAYS) AFTER THE DATE OF THIS PUBLIC NOTICE.

CERTIFICATE OF SERVICE

The undersigned, an employee of Haley, Bader & Potts, hereby certifies that the foregoing document was mailed this date by First Class U.S. Mail, postage prepaid, or was hand-delivered*, to the following:

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Allocations Branch, Policy & Rules Division
Federal Communications Commission
2025 M Street, N.W.
Room 8318
Washington, D.C. 20554

*Robert Hayne
Mass Media Bureau
Federal Communications Commission
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Washington, D.C. 20554

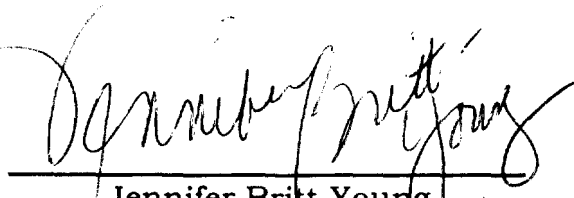
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Jennifer Britt-Young

*Hand Delivered

May 13, 1993